No. 97-934



IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

GEORGE VOINOVICH, Governor, State of Ohio; BETTY D. MONTGOMERY, Attorney General, State of Ohio; and MATHIAS H. HECK, JR., Montgomery County Prosecuting Attorney,

*Petitioners,*

—v.—

WOMEN'S MEDICAL PROFESSIONAL CORPORATION; and MARTIN HASKELL, M.D.,

*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals was correct in holding that Ohio's unique statute banning certain surgical abortions is unconstitutional because it effectively bans the most common method of second-trimester abortion?

2. Whether the court of appeals was correct in holding that Ohio's criminal statute banning abortions after viability is unconstitutional because it lacks both a scienter requirement and an adequate exception for abortions necessary to protect the woman's health?

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Respondents Women's Medical Professional Corporation and Martin Haskell, M.D., on behalf of themselves and the patients they serve, respectfully submit the following brief in opposition to the petition for certiorari filed by George Voinovich, the Governor of Ohio, et al. ["the State"], docketed on December 5, 1997.

## OPINIONS BELOW

The opinion of the district court is reported at 911 F. Supp. 1051 (S.D. Ohio 1995). The opinion of the court of appeals is reported at 130 F.3d 187 (6th Cir. 1997).

## PRELIMINARY STATEMENT

This case does not involve a "partial birth abortion" law. The Ohio statute does not use that term and defines the banned procedures differently than statutes that ban "partial birth abortion." *See* nn. 2 & 3 *infra*. At issue is a unique criminal statute that uses imprecise terminology to ban the dilation and extraction ("D&X") surgical abortion procedure throughout pregnancy, as well as "attempts" to use the D&X procedure. Although the focus of the ban is on the use of suction in abortion surgery, a first-trimester procedure, suction curettage or aspiration, is explicitly excluded from the ban. The other procedures that involve suction – particularly dilation and evacuation ("D&E"), the most common second-trimester abortion procedure - are swept into the ban.

The statute also bans most post-viability abortions. The post-viability ban lacks any *mens rea* requirement and therefore imposes strict criminal liability on physicians. Further, the post viability ban lacks an adequate exception for maternal health.

The jurisprudence applied by the lower courts to strike down the statute is both correct and well established. The

petitioners fail to present any conflict with the prior abortion decisions of this court or any conflict among the circuits that makes this case appropriate for review. The petition should be denied.

## COUNTERSTATEMENT OF THE CASE

### I. The Scope and Effect of HB 135

In 1995, the Ohio legislature passed HB 135, a criminal statute banning all abortions performed by the "D&X" procedure throughout pregnancy and prohibiting most post-viability abortions. Pet. Att.[1] The Act also requires fetal viability testing, defines viability and imposes five separate limitations on the few post-viability abortions that remain permissible under the Act.

#### A. The Method Ban in HB 135.

The Act defines the D&X procedure as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain...." Pet. Att.1 (Ohio Rev. Code Ann. ("O.R.C.") § 2919.15(A)). It specifically excludes the most common first-trimester methods, suction curettage and suction aspiration. *Id.* Contrary to the State's assertion, *see* Pet. at 15, the D&X definition in the Ohio Act is not synonymous with "partial birth abortion,"[2] nor is the Ohio Act similar to the partial

[1] Citations to the Petition are in the form "Pet."; to its unpaginated Attachment are in the form "Pet. Att."; and to its Appendix are in the form "A-__": citations to the trial record are given as "witness, transcript date, page."

[2] *See, e.g.*, Mich. Comp. Laws Ann. §§ 333.17016, 333.17516 (West Supp. 1997) (Partial-birth abortion means an abortion in which the physician "partially vaginally delivers a living fetus before killing the fetus and completing the delivery.").



birth abortion bans enacted in 16 other states.[3] Pet. at 15-16. Unlike the Ohio Act, the sixteen partial birth abortion bans do not even attempt to exclude from their scope any abortion procedures at all, nor do they include suctioning of the fetal brain as an element. Moreover, all the other statutes involve a ban on a method of terminating a fetal life while the Ohio Act refers to the broader concept of "termination of a human pregnancy," which includes removal of a dead fetus.

[3] Although defendants claim that 17 states, including Ohio, regulate partial birth abortions, see, Pet. at 15-16, only Ohio bans the D&X procedure. The other 16 states ban "partial birth abortion," defined using language nearly identical to that in Michigan. *See* n.2, *supra*, and statutes listed at Pet. 15-16. Eleven of these statutes have been challenged and have either been enjoined or are pending final adjudication. *See Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997) (permanent injunction); *Planned Parenthood of Southern Arizona v. Woods*, No. 97-385-TUC-RMB, 1997 U.S. Dist. LEXIS 17226 (D. Ariz. Oct. 24, 1997) (permanent injunction); *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997) (preliminary injunction); *Causeway Medical Suite v. Foster*, No. 97-2211 (E.D. La. July 14, 1997) (TRO); *Rhode Island Medical Soc'y v. Pine*, No. 97-416L (D.R.I. July 11, 1997) (TRO); *Little Rock Family Planning Services v. Jegley*, No. LR-C-97-581 (E.D. Ark. July 31, 1997) (TRO); *Planned Parenthood of Central New Jersey v. Verniero*, No. 97-6170 (D.N.J. Dec. 24, 1997) (TRO); *Summit Med. Assocs. v. James*, No. 97-T-1149N, 1998 U.S. Dist. LEXIS 737 (M.D. Ala. Jan. 26, 1998) (denying motion to dismiss in relevant part); *Midtown Hospital v. Miller*, No. 1:97-CV-1786-JOF (N.D. Ga. July 23, 1997) (denying TRO while limiting enforcement to post-viability); see *also Intermountain Planned Parenthood v. Montana*, No. BDV 97-477 (Mont. Dist. Ct. Oct. 1, 1997) (preliminary injunction under Montana Constitution); *Planned Parenthood of Alaska v. Alaska*, No. 3AN-97-06019 Civil (Alaska Sup. Ct. 3rd Dist. July 31, 1997) (TRO under Alaska Constitution).

**B. The Post-Viability Ban in HB 135.**

In addition to the method ban, HB 135 bans almost all post-viability abortions. The Act creates a rebuttable presumption of viability at twenty-four weeks of gestational age, Pet. Att. 5 (O.R.C. § 2919.17(C)), where gestational age is "the age of an unborn human as calculated from the first day of the last menstrual period of a pregnant woman." *Id.* at 2 (O.R.C. § 2919.16(B)). For any abortion performed after twenty-one weeks of pregnancy, the physician must perform a medical examination and tests to determine that the fetus is not viable. *Id.* at 6 (O.R.C. § 2919.18 (A)(1)-(2)).

The post-viability ban contains two exceptions, but both lack a *mens rea* or scienter requirement. *Id.* at 3-4 (O.R.C. § 2919.17(A)). The first exception permits post-viability abortions if a physician "determines in good faith and in the exercise of reasonable medical judgment, that the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman." *Id.* at 3 (O.R.C. § 2919.17(A)(1)). The second exception permits an abortion where the physician has determined "in good faith and in the exercise of reasonable medical judgment, after making a determination relative to the viability of the unborn human in conformity with [O.R.C. § 2919.18(A)] of the Revised Code [regulating the determination of viability] that the unborn human is not viable." *Id.* at 3-4 (O.R.C. § 2919.17(A)(2)).

The Act requires physicians who do perform post-viability abortions to take five additional steps: a certification requirement; a second physician concurrence requirement; a neonatal facility requirement; a choice-of-method requirement; and a second-physician attendance requirement.



*Id.* at 4-5 (O.R.C. § 2919.17(B)(1)). A person who violates the ban on post-viability abortions is subject to both criminal liability as well as civil liability for compensatory and punitive damages. *Id.* at 5-8 (O.R.C. §§ 2919.17 (D) & 2307.52(B)).

**C. General Description of Abortion Procedures and Relative Risks.**

Abortion is a very safe medical procedure and has become increasingly safe since this Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973) . One major reason for this is the development of safer abortion techniques.[4] In 1983, this Court acknowledged this development, finding that since *Roe*, "the safety of second-trimester abortion has increased dramatically . . . the principal reason is that the D&E procedure is now widely and successfully used." *City of Akron v. Akron Center for Reproductive Health, Inc.* ["*Akron I*"], 462 U.S. 416, 436-37, 430 n.11 (1983).

The majority of abortions performed in Ohio, and in the United States generally, occur during the first trimester of pregnancy. A-94-95. Those abortions are mainly performed by suction curettage or aspiration. A-21. In this procedure, the cervix is dilated and the products of conception removed by suction with a vacuum aspirator inserted into the uterus. *Id.*

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[4] Deaths from legal abortions declined fivefold between 1973 and 1985 (from 3.3 to 0.4 per 100,000 procedures), making abortion mortality more than 10 times lower than death from childbirth. *See* Council on Scientific Affairs, AMA, *Induced Termination of Pregnancy Before & After Roe v. Wade*, 268 JAMA 3231, 3235 (1992). Evolving abortion methods, particularly the shift from instillation to D&E for second-trimester abortions, are identified by the American Medical Association critical to this increased safety. *Id.* at 3232.

In the second trimester, when the fetus is often too large to be removed solely by suction, the dilation and evacuation ("D&E") procedure is most commonly used. A-22. During the D&E procedure, the physician employs both suction and forceps to accomplish a complete evacuation of the uterus. A-22. The fetal body, which at later stages of pregnancy cannot be removed simply with suction, must be crushed or disjoined. A-22. The head, because of its size, often cannot pass through the woman's cervical opening without some form of decompression. In this conventional D&E as well as in all of the surgical variations of the D&E, suction is used to remove the contents of the skull during the surgery. A-22-23.

Subsequent to the first trimester, other methods to terminate the pregnancy include induction or instillation methods. A-97-98; *see also* A-28 n.12. During these procedures, the physician either injects a substance, such as a prostaglandin and urea combination, into the woman's amniotic cavity, or places prostaglandin suppositories into the vagina. A-97. The substances trigger labor, which results in the eventual birth of a stillborn, often after more than twelve hours of labor.[5] A-97-98.

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5 The various induction methods have all the medical risks and complications of labor, A-104, as well as specific contraindications depending on each woman's medical diagnosis. For example, hypertension, asthma, epilepsy, and glaucoma are all contraindications for saline abortion. Campbell, 12/6 Tr. at 26. Similarly, prostaglandin abortions are contraindicated for women with asthma, epilepsy, glaucoma, and pulmonary hypertension or systemic hypertension. Instillation abortions may be contraindicated for women who have had previous cesarean sections or active pelvic infections, or for women with a fetal death in utero. A-105; Campbell, 12/6 Tr. at 26-28. Complications associated with induction abortion range from forcing fluids or fetal protein into the maternal circulation to hemorrhage and infection A-98, to severe respiratory and cardiac complications. Campbell, 12/6 Tr. at 31.



Rarely used abortion procedures include hysterotomy which is a cesarean section prior to viability, and a hysterectomy which is the surgical removal of the uterus. These are major surgical procedures and pose the most complications of all as they are much more invasive and traumatic than any of the other procedures. A-105.

**D. The Method Ban in HB 135 Encompasses the D&E Procedure.**

The D&E method is the most common and safest method of abortion during the second trimester. A-95; A-98. When the fetal skull is too large to pass through the cervix, physicians performing D&E abortion procedures use various techniques to reduce it. Some physicians crush the fetal skull with forceps and suction both the contents and skull pieces to remove them from the uterus. Others do not crush the skull but prefer to decompress it by suctioning its contents after the skull has been separated from the rest of the fetus. Another variation is employed by some physicians who compress the skull with suction while it is still attached to the rest of the fetus. *See* A-100-101 n.19. All of these surgical variations are encompassed by the HB 135 ban because they involve "purposely inserting a suction device into the skull of a fetus to remove the brain . . ." or an attempt to do so. A-23-27.

Three goals are pursued as surgeons continue to improve any surgical method. First, they seek to minimize trauma to the patient; second, minimize blood loss; and third, reduce surgical time. Suction helps a surgeon performing an abortion accomplish those goals by reducing the amount of material that must be removed physically by forceps and thereby permitting the evacuation of the uterine cavity more safely and expeditiously. A-96, 100. Suction has long been an important aid in abortion surgery. Prohibiting the use of suction to "remove the fetal brain" ignores the fact that

suction aids in the removal of *every* part of the fetus during abortion surgery, at *every* stage of gestation.

In all conventional second-trimester D&E surgical abortions, suction is employed to "purposely" remove the brain and all fetal parts. Indeed, Dr. Doe Number One testified that he seeks to "purposely" collapse the head by using suction to evacuate its contents in pregnancies as early as 15–18 weeks. A-101 n.19. Thus, Ohio's statute imposes a ban on all suction-assisted abortion techniques after the first trimester and effectively bans the conventional D&E surgical method.

### E. The D&X Method Employed by Dr. Haskell Is The Safest, Most Available Technique for Certain Abortions.

One variation of the D&E procedure is referred to as modified D&E, intact D&E or dilatation and extraction ("D&X"). A-22; A-98. Plaintiff respondent Dr. Haskell is one physician who uses this procedure. In this variation, the cervix is dilated and the physician tries to remove the fetus from the uterus intact. A-22-23; A-99-100. Using forceps, the physician performs a breech delivery of the fetus, with the exception of the head, which is too large to deliver. A-23; A-99. Since a major goal is to avoid trauma to the woman's cervix during the procedure, the physician creates a small opening at the base of the fetal skull and evacuates the contents, allowing the head to pass through the cervical opening. A-23; A-99. Drs. John Doe One and John Doe Two also employ surgical abortion techniques similar to the D&X. A-101 n.19.

Although the conventional D&E is the safest abortion technique from the thirteenth to the twentieth week of pregnancy, after the twentieth week, the size of the fetus and the increased difficulty of dismemberment make uterine



injury more likely. A-97-98. The district court found that D&X was preferable to D&E because "it does not require sharp instruments to be inserted into the uterus with the same frequency or extent," A-110, and "because it causes less trauma to the maternal tissues (by avoiding the break up of bones, and the possible laceration caused by their raw edges), less blood loss, and results in an intact fetus that can be studied for genetic reasons." A-107. Further, unlike D&E, the D&X procedure prevents the woman from coming into contact with neurologic fetal tissue, which can interfere with the woman's blood-clotting ability. A-96.

After comparing the risks associated with the available abortion techniques -- including D&E, D&X, induction methods, and hysterotomy and hysterectomy -- the district court correctly determined that after the twentieth week of a woman's pregnancy, the D&X procedure employed by Dr. Haskell is the safest method of abortion. A-105-111. The district court also found that the D&X procedure performed by Dr. Haskell is more available in Ohio than its main alternative, the induction method. A-111-12.

### F. The Health Exception to the Post-Viability Abortion Ban is Limited to Physical Health.

HB 135 permits a post-viability abortion if the abortion is "necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman."[6] Pet. Att. 3

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[6] The law defines "serious risk of the substantial and irreversible impairment of a major bodily function" as:

> any medically diagnosed condition that so complicates the pregnancy of the woman as to directly or indirectly cause the substantial and irreversible impairment of a major bodily function, including, but not limited to, the following conditions:
>
> (1) Pre-eclampsia;

(O.R.C. § 2919.17). The Court of Appeals and the district court correctly found that this health exception impermissibly restricts physicians to physical health problems and excludes all consideration of mental and emotional health problems that may be manifested by the pregnant woman. A-34; A-137-38. For example, HB 135 would have blocked an abortion sought by an eleven year old victim of incest who was the subject of testimony. That pregnancy was twenty-two weeks along when terminated by Dr. Hillard shortly before the trial of this action. A-136. The Act would also have prohibited the abortions of Jane Doe I and Jane Doe II who very much wanted their pregnancies to continue but who both carried fetuses with severe fetal anomalies. A-132-136.

## II. History of the Litigation

### A. District Court Opinion

On the basis of six days of hearings, the district court found that both the method and post-viability bans were void for vagueness and violated the right of privacy. A-94, 102, 112-113. The district court found that the D&X abortion method is a variant of the most common second-trimester abortion method, the D&E. A-100. Because the Act's definition of D&X focuses on the use of suction, the ban encompasses both D&E and the D&X variant. The court found that the Act failed to provide fair warning of the prohibited conduct and, therefore, was unconstitutionally vague. A-102.

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(2) Inevitable abortion;

(3) Prematurely ruptured membrane;

(4) Diabetes;

(5) Multiple sclerosis.

Pet. Att. 2-3 (O.R.C. § 2919.16(J)).



In addition, the court made extensive factual findings that the D&X technique, in which the physician attempts to remove the fetus intact, is the safest abortion method for women over twenty weeks pregnant. A-110-113. Prohibiting this method, even if it could be defined as distinct from conventional D&E, would impermissibly compromise the lives and health of women. *Id.* Moreover, the district court found the Act not only failed to promote the state's claimed interest in preventing cruelty to the fetus, A-121, but that the selectiveness with which it served this interest was some indication that the actual purpose was to erect an obstacle to women seeking abortion services. A-118-19 n.29.

The district court held that the ban on post-viability abortions was unconstitutional because it lacked a valid medical emergency or medical necessity exception. The Act unduly limited the physician's discretion to determine the measures necessary to preserve a woman's life and health, including her mental health. A-34; A-137.

The district court also held that the Act's conflicting standards for viability testing were unconstitutionally vague since it the physician's determination of viability might be judged by an objective standard. A-152. The court also found the medical emergency exception unconstitutional because it lacked a clear scienter requirement for its criminal and civil provisions. *Id.*

### B. Court of Appeals Opinion

The court of appeals (per Kennedy & Brown, JJ.) agreed with the district court that the Act's ban on the D&X procedure was unconstitutional because it included not only D&X abortions, but also the most common second-trimester method of abortion, conventional D&E. The ban clearly violated the standard set forth in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and the court below further held

that the post-viability application of the ban could not be severed from the previability application and that "[a]ccordingly, the entire ban is unconstitutional." A-32. The court of appeals did not address the district court's findings that the D&X definition was unconstitutionally vague; that the D&X procedure as performed by Dr. Haskell was potentially safer than other available methods; or that the D&X ban failed to serve the State's asserted purpose for the legislation.

The appellate court also affirmed the district court's ruling invalidating the ban on post-viability abortions. A-34. The court held that the medical necessity and medical emergency provisions were unconstitutionally vague because they lacked scienter requirements, *id.*, and failed to include any protection for a "serious non-temporary threat to a pregnant woman's mental health." A-48.

Judge Boggs dissented from the majority's opinion and would have upheld the constitutionality of the statutes.

## REASONS FOR DENYING THE WRIT

The petition for certiorari should be denied because the State has failed to establish any of the factors that weigh in favor of a grant of certiorari. First, the decision of the court below is not "in conflict with the decision of another United States court of appeals on the same important matter," Sup. Ct. R. 10(a); nor did the court below decide "an important federal question ~~in a~~ way that conflicts with relevant decisions of this Court." Sup. Ct. R. 10(c). Further, no important question of federal law is raised by this case that has not been, but should be settled by the Court. *Id.* Accordingly, the petition should be denied.



## I. THE DECISION OF THE COURT OF APPEALS PRESENTS NO IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

### A. The Invalidation Of Ohio's Surgical Suction Ban By The Court Of Appeals Was Required Under Well-Settled Decisions Of This Court.

#### 1. The Ban on D&X Abortions as Defined in HB 135 is Unconstitutionally Vague.

The Act expansively defines D&X abortion procedures, in relevant part, as "the termination of a human pregnancy by purposely inserting a suction device into the skull of a fetus to remove the brain . . ." Pet. Att. 1 (O.R.C. §2919.15(A)). The court of appeals carefully reviewed the findings of the district court and held: "We believe the record amply supports the District Court's and our conclusion that the D&E procedure can entail purposely inserting a suctioning device into the skull in order to empty the brain contents." A-26 (footnote omitted). The court also noted that the ban on any "attempt" to perform the D&X procedure further supported this conclusion. A-26 n.10.

The court of appeals did not specifically address the district court's legal conclusion that this method ban was unconstitutionally vague, but the district court conclusion on that point is entirely consistent with this Court's jurisprudence requiring that criminal laws provide "fair warning as to what conduct is permitted, and as to what conduct will expose them to criminal and civil liability." A-102 (footnote omitted). *See Grayned v. City of Rockford*, 408 U.S. 104 (1972). This principle is particularly important when the criminal laws implicate constitutionally protected activity. *See, e.g., Colautti v. Franklin*, 439 U.S. 379, 395 (1979). Finally, as a result of the vagueness of the Act, it has

the additional defect of exposing physicians to arbitrary enforcement and chilling physicians from providing abortions. *See id.*

**2. The Ban on D&X Abortions Imposes an Undue Burden on the Right of Women to Choose Previability Abortions.**

The holding of the court of appeals that the Act imposes an undue burden on women's access to previability abortions follows directly from this Court's determination that it is unconstitutional to ban a safe, common method of abortion. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976), this Court invalidated a ban on saline amniocentesis abortions (a type of induction procedure). At the time *Danforth* was decided, approximately 70% of all post-first-trimester abortions in Missouri were done by saline amniocentesis, 428 U.S. at 76, and the saline procedure was safer with respect to maternal mortality than continuing a pregnancy to term. *Id.* at 77. This Court held that the ban was unconstitutional because it "forces a woman and her physician to terminate her pregnancy by methods [namely hysterotomy or hysterectomy] more dangerous to her health than the method outlawed." *Id.* at 79.

The principles established in *Danforth* apply here. By effectively banning all D&E procedures, including the D&X variation, the Act is "almost tantamount to a prohibition of any abortion" after 12 weeks of pregnancy. *Id.*, 428 U.S. at 102 (Stevens, J., concurring in part and dissenting in part). Between 13 and 16 weeks of pregnancy, the only abortion procedures that physicians perform is the D&E. A-97. After sixteen weeks, induction procedures would theoretically be available despite the Act, but compared to inductions, D&Es are "less painful," A-98, "take [ ] less time," *id.*, and have a "reduced risk of retained products of conception, infection, hemorrhage, and cervical injury." *Id.* Thus, for some



women, the Act operates as a ban on all second-trimester abortions except for hysterotomy and hysterectomy, and for others it operates as a ban on the safest and most available abortion methods. This is plainly unconstitutional under *Danforth*.

The lower courts correctly concluded that *Casey* also requires invalidation of the Ohio Act. "Because the definition of the banned procedure includes the D&E procedure, the most common method of abortion in the second trimester, the Act's prohibition on certain uses of suction in post-first-trimester abortions has the effect 'of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.'" A-28 (quoting *Casey*, 505 U.S. at 877). In *Casey*, this Court struck down Pennsylvania's spousal notice requirement because it "will often be tantamount to [a] veto" over a woman's abortion decision. 505 U.S. at 897. Here, by banning all abortions between 13 and 16 weeks of pregnancy and dramatically limiting abortions thereafter to those that are less safe and less available, the Act will effectively prevent a significant number of women from obtaining pre-viability second-trimester abortions.

Even if the Act banned only the D&X abortions as performed by Drs. Haskell, John Doe I and John Doe II, the lower court ruling would still be correct under *Casey*, *Danforth* and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).[7] As the

[7] The State originally claimed that the conventional D&E procedure was included in the definition of suction curettage and vacuum aspiration procedures and therefore not banned by HB 135, since the Act explicitly excludes those procedures. This argument was carefully considered and then firmly rejected by the district court which held that suction curettage and vacuum aspiration describe first-trimester abortion procedures and that conventional D&E is clearly a second-trimester procedure. A-94. The State has now abandoned this argument but continues, now without

district court here held: "use of the D&X procedure in the late second trimester appears to pose less of a risk to maternal health" than the D&E procedure, the induction procedure or hysterotomy and hysterectomy. A-110.[8] As a result, the

foundation, to argue to this Court that the Ohio ban is limited to the D&E variation performed by Dr. Haskell and known as intact D&X, even though the text of the Act wholly fails to do so.

[8] The State and Judge Boggs in dissent rely on a statement by the Board of Trustees of the American Medical Association (AMA) for the medical conclusion that the D&X procedure is never the only appropriate abortion procedure. *See* Pet. 17; A-59. This statement is not part of the record in this case and was not even issued until nearly two years after HB 135 was passed. This Court is not in a position to weigh a nonrecord opinion by the AMA against all of the record evidence in this case. *See Russell v. Southard*, 12 How. 139, 159 (1851) ("This court must affirm or reverse upon the case as it appears in the record"). *See also New Haven Inclusion Cases*, 399 U.S. 392, 450 n.66 (1970).

The AMA definition of "intact D&X" is markedly different from the definition in HB 135, because the former requires, *inter alia*, that the fetus be *living* after the torso is delivered intact and before the head is compressed. In this case, the State stipulated that at the beginning of the D&X procedure "some fetuses are dead and some are alive." A-118 n.29. Thus the procedure banned by the Ohio law is much broader than that defined by the AMA. Nor is the recent AMA statement consistent with the Statement of Policy on Intact D&X by the American College of Obstetricians and Gynecologists (ACOG). The opinion of the Ohio ACOG Section Chief was presented to the district court and explained at trial by Dr. Goler. *See* 12/16 Tr. at 126-27.

Finally, in its recent published statement, ACOG has taken the position that the intact D&X procedure "may be the best or most appropriate procedure in a particular circumstance to save the life or preserve the health of a woman, and only the doctor, in consultation with the patient, based upon the woman's particular circumstances can make this decision." Statement on Intact Dilatation and Extraction, ACOG Statement of Policy (Jan. 12, 1997). Even the AMA itself has stated that the intact D&X procedure "may minimize trauma to the woman's uterus, cervix, and other vital organs. Intact D&X may be preferred by some physicians, particularly when the fetus has been diagnosed with hydrocephaly or other anomalies incompatible with life outside the



district court correctly concluded that "[b]ecause the D&X procedure appears to have the potential of being a safer procedure than all other available abortion procedures" used in the later part of the second trimester, "the state is not constitutionally permitted to ban the procedure." *Id.* It further concluded that if "women were forced to use riskier and more deleterious abortion procedures," the ban would unduly burden the abortion right. A-110-11. That holding follows ineluctably from *Casey*, and this Court's prior abortion jurisprudence.

A state cannot force a woman from a safer abortion procedure to a riskier one. In *Thornburgh*, this Court struck down a statute that would have required doctors performing post-viability abortions to use the abortion method most likely to result in a live birth, unless doing so "would present a significantly greater risk to the life or health of the pregnant woman." 476 U.S. at 768. Because the statute required a "trade-off" between the woman's health and fetal survival, and "failed to require that maternal health be the physician's paramount consideration," *id.* at 768-69, it was facially unconstitutional. *Id.* at 769 (citing *Colautti*, 439 U.S. at 397-401). If a woman cannot be required to have an abortion procedure that exposes her to any additional health risk for the fetus after viability, she surely cannot be forced to do so prior to viability.

This conclusion regarding the more limited ban on a narrowly interpreted HB 135 is also supported by *Danforth*. There the court examined several factors in concluding that Missouri could not ban the use of saline amniocentesis as a method of abortion. First, the Court looked at whether saline amniocentesis was "an accepted medical procedure in this

womb." *See Carhart*, 972 F. Supp. at 515 (quoting AMA statement as a finding of fact).

country." *Id.*, 428 U.S. at 77. Ohio's method ban, even if it does not cover D&E's generally, prohibits an accepted medical procedure. Second, *Danforth* relied on the "anomaly" that the Missouri law banned saline abortions "but [did] not prohibit techniques that are many times more likely to result in maternal death." 428 U.S. at 78. Similarly, the Ohio method ban does not prohibit abortions by hysterotomy or hysterectomy, both of which procedures "are many times more likely to result in maternal death" than D&X abortions. Finally, the Court observed that saline abortions were "safer, with respect to maternal mortality, than even continuation of the pregnancy until normal childbirth." *Id.* Here, too, the D&X ban is safer than continuation of pregnancy through childbirth. Thus, under *Danforth*, even a narrower D&X ban, as suggested by the State, is invalid.

**3. The Ban on D&X Abortions Unconstitutionally Increases the Health Risks of Post-Viability Abortions.**

To the extent that the method ban extends to abortions after viability, the lower court's decision is squarely supported by *Thornburgh* and *Casey*, and thus raises no issues appropriate for review by this Court. It is well-established that after viability, a woman has the right to obtain an abortion "where it is necessary, in appropriate medical judgment, for the preservation of [her] life or health . . ." *Casey*, 505 U.S. at 879 (citing *Roe*, 410 U.S. at 164-165), and that she is entitled to select the abortion method that is safest for her health. *Thornburgh*, 476 U.S. at 768-69; *Jane L. v. Bangerter*, 61 F.3d 1493, 1502-05 (10th Cir. 1995), *rev'd on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996). Thus, even if the Act reached only the D&X procedures as claimed by the State, the ban is unconstitutional because the D&X procedure is safer after



viability than other types of post-viability abortion procedures. A-110.

**B. The Unconstitutionality Of Ohio's Post-Viability Abortion Ban Is Well-Settled.**

**1. The Lack of a Scienter Requirement Renders the Post-Viability Ban Vague.**

The court of appeals properly struck down the ban on post-viability abortions, holding that "the medical necessity and medical emergency provisions are unconstitutionally vague because they lack scienter requirements." A-34. This ruling is consistent with well-established caselaw.

HB 135 permits the physician to proceed with a post-viability abortion upon a determination of "medical emergency" made "in good faith and in the exercise of reasonable medical judgment." *See* Pet. Att. 2 (O.R.C. §2919.16(F)). Likewise, application of the "medical necessity" exception requires a physician determination made "in good faith and in the exercise of reasonable medical judgment." *Id.* at 3 (O.R.C. §2919.17(A)(1)). The court described the defect as follows:

> Thus, both of these provisions contain subjective and objective elements in that a physician must believe that the abortion is necessary and his belief must be objectively reasonable to other physicians. This dual standard as written contains no scienter requirement. Therefore, a physician may act in good faith and yet still be held criminally and civilly liable if, after the fact, other physicians determine that the physician's medical judgment was not reasonable.

A-35. In concluding that the absence of a scienter requirement made these provisions unconstitutionally vague, the court of appeals properly relied on three cases. First, in *Colautti*, this Court held a Pennsylvania law unconstitutionally vague which required each physician who performs an abortion to determine viability "based on his experience, judgment, or professional competence." *Id.*, 439 U.S. at 380 n.1 (quoting Pennsylvania statute). Additional requirements were imposed by the statute "if there [was] sufficient reason to believe that the fetus [might] be viable." *Id.* This language lacked a scienter requirement and therefore served as "little more than 'a trap for those who act in good faith.'" *Id.* at 395 (citations omitted). Similarly, the court below correctly concluded that the language of HB 135 will have a profound "chilling effect" on physicians who "cannot know the standard under which their conduct will ultimately be judged." A-38.

The only other court of appeals decisions addressing this issue in the abortion context have been decided by the Eighth Circuit and support the decision of the court of appeals in this case. *See Fargo Women's Health Org. v. Schafer*, 18 F.3d 526, 534 (8th Cir. 1994) (presence of scienter requirement saved North Dakota medical emergency definition); *Planned Parenthood v. Miller*, 63 F.3d 1452, 1465 (8th Cir. 1995) (absence of scienter requirement made criminal provisions of South Dakota parental notice and waiting period unconstitutional), *cert. denied*, 116 S. Ct. 1582 (1996).

The State practically concedes the vagueness of the Act in the petition when it laments the failure of the courts to accept "reasonableness" as a basis for criminal liability in the area of abortion regulation. By conceding that "clear lines are hard to find," Pet. 26, the State itself has underscored the need for a scienter requirement. The court of appeals thus



correctly held that the post-viability ban in HB 135 is unconstitutionally vague.

### 2. The Lack of an Adequate Health Exception Violates the Right to Privacy.

Ohio's post-viability abortion ban, which limits its health exception to physical health, runs afoul of twenty-five years of this Court's jurisprudence consistently holding that a ban on abortions after viability must contain exceptions for abortions necessary to preserve the woman's life and health. *Roe*, 410 U.S. at 165 (State may proscribe abortion after viability "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother"); *Colautti*, 439 U.S. at 400; *Casey*, 505 U.S. at 879 (reaffirming *Roe's* requirement that post-viability abortion ban contain exception for woman's life and health); *Thornburgh*, 476 U.S. at 768-69 (woman's health must be physician's "paramount consideration" even after viability). *See also Jane L. v. Bangerter*, 102 F.3d 1112, 1118 n.7 (10th Cir. 1996), *cert. denied*, 117 S. Ct. 2453 (1997).

That "health" under *Roe's* required exception to post-viability abortion bans includes mental health is not in doubt. *Roe* itself states that whether the woman's health would be preserved by an abortion must be left to "appropriate medical judgment." 410 U.S. at 165. Certainly such medical judgment must take into account both physical and mental health. Moreover, as this Court wrote before it decided *Roe*, "whether a particular operation is necessary for a patient's physical or mental health is a judgment that physicians are obviously called upon to make routinely whenever surgery is considered." *United States v. Vuitch*, 402 U.S. 62, 72 (1971) (footnote omitted).

It strains credulity to suppose that when this Court used the word "health" in requiring exceptions to post-viability

bans in *Roe* two years later, and re-affirmed that language in *Casey*, the Court intended physicians to use "appropriate judgment" different from that used "whenever surgery is considered." *See Doe v. Bolton*, 410 U.S. 179, 191-92 (1973) (statute at issue in *Vuitch*, having been construed to "bear upon psychological as well as physical well-being," allowed physicians to exercise judgment they would be "called upon to make routinely"). Thus, the holding of the court of appeals that Ohio's post-viability ban is invalid because it lacks a mental health exception, *see* A-45-49, is entirely consistent with settled law.

## II. THE STANDARD OF REVIEW APPLIED BY THE COURT OF APPEALS IS IN ACCORD WITH THE DECISIONS OF THE OTHER UNITED STATES COURTS OF APPEALS AND OF THIS COURT.

### A. The Standard Of Review Employed By the Court Of Appeals To Determine That Ohio's Abortion Method Ban Violates The Right To Privacy Is Consistent With The Decisions Of This Court And Of The Majority Of Courts Of Appeals.

The standard of review used by the court of appeals to assess the facial constitutionality of Ohio's method ban is the standard used by the controlling opinion of this Court in reviewing the Pennsylvania abortion restrictions in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). *Casey* holds that a pre-viability abortion restriction is unconstitutional on its face if "in a large fraction of the of the cases in which [the restriction] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion." 505 U.S. at 895 (joint opinion). The court below properly used this standard in affirming the district court's judgment that the method ban is invalid, reasoning as follows:



> [I]t follows that a statute which bans a common abortion procedure would constitute an undue burden. An abortion regulation that inhibits the vast majority of second-trimester abortions would clearly have the effect of placing a substantial obstacle in the path of a woman seeking a pre-viability abortion.

A-28. Thus, there is no conflict between the decision of the court below and the most recent (and hence controlling) relevant decision of this Court.

In order to find a conflict that calls for resolution, the State therefore urges this Court to look to older decisions of this Court seemingly applying a different standard and to two decisions of a single court of appeals. But its efforts are unavailing. The proposed alternative standard of review, dubbed the *Salerno* standard because it derives from this Court's opinion in *United States v. Salerno*, 481 U.S. 739, 745 (1987), "has been properly ignored in subsequent cases even outside the abortion context." *Janklow v. Planned Parenthood*, 116 S. Ct. 1582, 1583 (1996) (Stevens, J., respecting denial of certiorari) (footnote omitted). Under the *Salerno* dictum, a facial challenge fails unless the challenger shows that there "is 'no set of circumstances' in which the statute could be validly applied." *Id.* This "unfortunate language," *id.*, has never been used by this Court to uphold an abortion restriction that is invalid in a large fraction of its applications.

The abortion cases cited by the State that quote *Salerno's* dictum, *see* Pet. at 10, do not "apply" this standard. First, because the restriction at issue in *Rust v. Sullivan*, 500 U.S. 173 (1991), involved federally funded programs, and because this Court has long held that no right is impinged upon by abortion restrictions in federal funding programs, *see Harris v. McRae*, 448 U.S. 297 (1980), *Rust* actually holds that no

right is violated by the Title X regulations at issue there, not that the regulation is valid even though it violates the Constitution in a large fraction of cases. *See id.*, 500 U.S. at 201-02 (government has no constitutional duty to subsidize abortion counseling or referral). Similarly, although this Court's opinion in *Ohio v. Akron Center for Reproductive Health* [*Akron II*], 497 U.S. 502 (1990), quotes *Salerno*, it does not apply it. Instead, *Akron II* holds the inverse of *Salerno*: that a statute will not be held unconstitutional because it might, in an unlikely or "worst case scenario," violate the Constitution. *See id.* at 514 ("The Court of Appeals should not have invalidated the Ohio statute based upon a worst-case analysis that may never occur."). Similarly, Justice O'Connor in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), wrote that "there may be conceivable applications of [Missouri's] ban on the use of public facilities that would be unconstitutional," *id.* at 523 (O'Connor, J., concurring in part and concurring in the judgment), but found the presence of such "conceivable applications" insufficient to render the statute invalid on its face. *See also Washington v. Glucksberg*, 117 S. Ct. 2302, 2304-05 & n.6 (1997) (Stevens, J., concurring in the judgments). Thus, there is no conflict between the decision of the court below and any of the abortion decisions of this Court cited by the State.

There is likewise no real conflict between the decision of the court below and the decisions of the one court of appeals that even nominally continues to adhere to the *Salerno* dictum. Neither *Barnes v. Moore*, 970 F.2d 12 (5th Cir.), *cert. denied*, 506 U.S. 1021 (1992), nor *Causeway Medical Suite v. Ieyoub*, 109 F.3d 1096 (5th Cir.), *cert. denied*, 118 S. Ct. 357 (1997), present a real conflict with the decision of the court below.



First, the *Causeway* decision holds a Louisiana abortion statute unconstitutional under the *Salerno* regime; *a fortiori*, the same statute would be unconstitutional under the more protective standard employed by the court below. Simply put, *Causeway* did not apply *Salerno* "to deny relief in a case in which a facial challenge would otherwise be successful." *Janklow*, 116. S. Ct. at 1583 (Stevens, J., respecting denial of certiorari) (footnote omitted).

Second, as Justice Stevens has noted, "[i]n all likelihood, the decision of the Fifth Circuit [in *Barnes*] applying the 'no circumstance' test would have been decided the same way even if that court had utilized the 'large fraction' test . . . " *Janklow*, 116. S. Ct. at 1583 n.2 (Stevens, J., respecting denial of certiorari). Thus, as to both *Barnes* and *Causeway*, the purported conflict is not sufficiently direct and real to merit resolution by this Court.[9]

In any event, under the State's analysis, *Salerno's* "no set of circumstances" standard is met here. Because the same result would be reached in this case regardless of what standard is applied, there is no reason for this Court to review the lower court decision. The State asserts that "[t]he traditional Salerno requirement has long been met when a statute 'operates on a fundamentally mistaken premise.'" Pet. at 21 (quoting *Secretary of State of Maryland v. J.H. Munson Co.*, 467 U.S. 947, 966 (1984)). In *Casey*, the State

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9 Indeed, once the suggested conflict with the Fifth Circuit is laid aside, the decision of the court below to apply the standard used by the joint opinion in Casey is in complete harmony with all other federal courts to consider the question. *Jane L.*, 102 F.3d at 1116; *Miller*, 63 F.3d at 1456-58; *Casey v. Planned Parenthood*, 14 F.3d 848, 861 (3d Cir. 1994); *Compassion in Dying v. Washington*, 79 F.3d 790, 798 n.9 (9th Cir. 1996) (en banc), *rev'd on other grounds sub nom. Washington v. Glucksberg*, 117 S. Ct. 2258 (1997); *see also Karlin v. Foust*, 975 F. Supp. 1177, 1204 (W.D. Wis. 1997).

argues, the spousal notice provision was unconstitutional because it rested on the "mistaken premise" that "'a husband's interest in the potential life of the [unborn] child outweighs a wife's interest [to choose to have an abortion].'" Pet. 21. The same principle applies here. The ban on D&X abortions throughout pregnancy is unconstitutional under the *Salerno* dictum because it rests on the "mistaken premise" that prior to viability any state interest in the potential life of the fetus justifies forcing a woman into having a less safe abortion, or preventing her from making her own decision as to what procedure is best for her. This plainly is not the case.

### B. The Standard Of Review Employed By The Court Of Appeals To Determine That Ohio's Post-Viability Ban Is Vague Is Consistent With The Decisions Of This Court And Of The Other Courts Of Appeals.

The State also contends that the vagueness standard applied by the court below conflicts with the standard applied by this Court and several courts of appeals. Contrary to the State's argument, however, the decision of the court below is entirely consistent with this Court's precedents; and whatever conflicts may exist between the standard applied by the court below and the standard applied by other courts of appeals is not a direct and real conflict, but one that evaporates upon careful examination of the cases cited by the State.

The State's claim that the vagueness standard used by the court of appeals conflicts with this Court's decision in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), is simply incorrect. In *Hoffman*, this Court was careful to qualify its statement that a facial vagueness challenge should be upheld "only if the enactment is impermissibly vague in all of its applications" with the phrase "assuming the enactment implicates no constitutionally protected conduct." *Id.* at 494-95. Similarly,



the Court's subsequent opinion in *Kolender v. Lawson*, 461 U.S. 352 (1983) rejects a requirement that a statute must be "vague in all of its possible applications," *id.*, 461 U.S. at 358 n.8 (quoting Justice White's dissent), in order to be held vague on its face. Instead, the *Kolender* Court recognizes that the Court has "traditionally viewed vagueness and overbreadth as logically related and similar doctrines," holding that when a statute imposes criminal penalties and affects constitutionally protected conduct, the *Hoffman* vagueness test does not necessarily apply. *Id.* The Court also cited *Colautti* with approval, which invalidated an abortion statute on vagueness grounds. *Kolender*, 461 U.S. at 358 n.8. *See also Akron I*, 462 U.S. at 451-52 (invalidating requirement that fetal remains be disposed of "humane[ly]" as impermissibly vague). The State is simply mistaken that the vagueness standard used by the court below conflicts with *Hoffman*, as further elucidated in *Kolender*.

Because none of the other cases cited by the State involve a facial vagueness challenge to a statute affecting constitutionally protected conduct, the State has presented no conflict at all between the vagueness standard applied by the

court of appeals and the standard used by this Court[10] and other courts of appeals.[11]

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[10] First, *Chapman v. United States*, 500 U.S. 453 (1991), in which the Court affirmed a criminal conviction for distributing more than one gram of the prohibited drug LSD, was simply not a facial challenge to a statute, and thus has no bearing on the standard applicable in such a challenge. Further, *Chapman* obviously did not involve constitutionally protected conduct. Second, *Maynard v. Cartwright*, 486 U.S. 356 (1988), which affirmed a grant of habeas corpus to a man sentenced to death in Oklahoma, was decided "under the Eighth Amendment," *id.*, at 361, and involved analysis of whether a particular "aggravating circumstance" was sufficiently clear to "inform juries what they must find to impose the death penalty." *Id.* at 361-62. The Court explicitly distinguished general Due Process Clause vagueness law, which looks to whether a statute gives adequate notice of prohibited conduct. *Id.* at 361. Because *Maynard* was decided under a different analysis, it too does not alter *Hoffman* or *Kolender*.

Nor is there any conflict between the two pre-*Hoffman/Kolender* cases cited by the State, *United States v. Powell*, 423 U.S. 87 (1975), and *United States v. Mazurie*, 419 U.S. 544 (1975), both of which involved appeals from criminal convictions in federal court, and hence were not facial vagueness challenges at all. Nor did either case involve constitutionally protected conduct. Powell was convicted of sending a sawed-off shotgun through the mails, 423 U.S. at 89; and the defendants in *Mazurie* were convicted of introducing liquor into an Indian reservation. 419 U.S. at 545.

[11] None of the court of appeals cases cited by the State involve constitutionally protected conduct. *See United States v. Reed*, 114 F.3d 1067, 1068 (10th Cir. 1997) (appeal from conviction of possession of a weapon or ammunition while unlawfully using marijuana); *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.2d 681, 684 (2d Cir. 1996) (plaintiffs "concede that the local law does not infringe upon a fundamental constitutional right"); *United States v. A Single Family Residence*, 803 F.2d 625 (11th Cir. 1986) (civil forfeiture for drug transaction); *Stoianoff v. Montana*, 695 F.2d 1214 (9th Cir. 1983) (challenge to statute restricting drug paraphernalia). The Eleventh Circuit decision actually confirms *Hoffman* and *Kolender*. *See* 803 F.2d at 630.



## CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

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